CRIMINAL YEAR SEMINAR

April 19, 2019 - Tucson, Arizona
April 26, 2019 - Phoenix, Arizona
May 3, 2019 - Chandler, Arizona

DUELING PERSPECTIVES: PROSECUTION & DEFENSE

Presented By:

Robert McWhirter
Attorney at Law
&
Jonathan Mosher
Chief Trial Counsel
Pima County Attorney's Office

Distributed By:

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL
1951 W. Camelback Road, Suite 202
Phoenix, Arizona 85015

And

CLE WEST
5130 N. Central Ave
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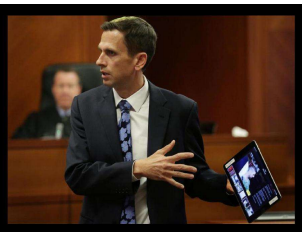

Dueling Perspectives 2019:
McWhirter v. Mosher

The case interpretations, analysis, and opinions expressed in these materials and in the related presentation are the views of the author alone and do not represent the views of the Pima County Attorney's Office or APAAC.

1

THERE BUT FOR THE GRACE OF GOD GO I

2

State v. Acuna Valenzuela,
245 Ariz. 197 (2018)

- Edgar testifies against Jose
- Jose goes to prison
- Jose gets out

3

State v. Acuna Valenzuela,
245 Ariz. 197 (2018)

- Edgar gets ice cream with girlfriend Perla
- Jose sees Edgar
- Says "I did prison time for him."
- Jose shoots Edgar & Perla, killing Edgar & seriously wounding Perla

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State v. Acuna Valenzuela,
245 Ariz. 197 (2018)

- Should PDWPP have been severed?
- Was it error to admit evidence of the prior?
- Was it error to call the prior "less serious"?
- *Voir dire* issues
- "Misconduct" allegations

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State v. Acuna Valenzuela,
245 Ariz. 197 (2018)

- Should PDWPP have been severed?
- *Current Rule 13.4(a) [effective 1/1/18]*
  - "On motion or on its own, and if necessary to promote a fair determination of any defendant's guilt or innocence of any offense, a court must order a severance of counts, defendants, or both."

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State v. Acuna Valenzuela,
245 Ariz. 197 (2018)

- Should PDWPP have been severed?
- *Prior Rule 13.4(a) [effective at time of trial]*
  - "Whenever...severance...is necessary to promote a fair determination...the court ***may*** on its own initiative, and ***shall*** on motion of a party, order such severance."

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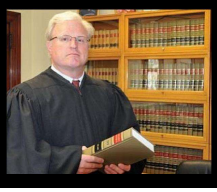
State v. Acuna Valenzuela,
245 Ariz. 197 (2018)

- Should PDWPP have been severed?
- D's prior proved motive
- Held: Properly-noticed Rule 404(b) evidence



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State v. Acuna Valenzuela,
245 Ariz. 197 (2018)

- Supremes not thrilled with R404(b) record
- Ensure 404(b) findings are on the record
  - C&C proof D committed the act
  - Proper purpose
  - Relevant to prove that purpose
  - 403 balancing

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State v. Acuna Valenzuela,
245 Ariz. 197 (2018)

- **Was it error to call the prior "less serious"?**
  - **This was how the prior was sanitized!**
  - **Is "serious" now a trigger word?**
  - **Be careful out there...**

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State v. Acuna Valenzuela,
245 Ariz. 197 (2018)

- *Voir dire* issues
- Court can limit...but we get some
- Preconceived notions or opinions ≠ cause

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State v. Acuna Valenzuela,
245 Ariz. 197 (2018)

- ***Voir dire* issues**
- **Friendship w/ another MCAO prosecutor: "more likely than not" would not affect ("absolutely" open to life sentence)**
- **Assurances of impartiality need not be couched in absolute terms**
- **Not automatically barred if know people involved in case**

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State v. Acuna Valenzuela,
245 Ariz. 197 (2018)

- "Misconduct" allegations
- Objection- "not true"
  - May not convey belief about credibility
- Referring to unadmitted tape
  - May not refer to matters not in evidence
- Occurred following "thorough impeachment"
- Cumulative, isolated, & harmless

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State v. Acuna Valenzuela,
245 Ariz. 197 (2018)

- "Misconduct" allegations
- Vouching
  - Place prestige of government behind witness
  - Suggest unadmitted information supports testimony

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State v. Acuna Valenzuela,
245 Ariz. 197 (2018)

- "Misconduct" allegations/vouching
- "Focus on the real facts" is not vouching

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State v. Acuna Valenzuela,
245 Ariz. 197 (2018)

- "Misconduct" allegations
- What if everyone testified the same
- This is fine:
  "if you heard nothing but a parade of witnesses who said exactly the same thing...what would the allegation then be? The government coached them...and that didn't happen."

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State v. Acuna Valenzuela,
245 Ariz. 197 (2018)

- "Misconduct" allegations
- Everyone but defense witnesses lying?
- Argument:
  "the story that the defendant needs you to believe is that ...every person except for Sylvia and Griselda [defense witnesses] are lying to you...."

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State v. Acuna Valenzuela,
245 Ariz. 197 (2018)

- **Held:**
  "The prosecutor's conclusion that Acuna 'need[ed]' the jury to believe that everyone but the two defense witnesses were lying... comes close to attempting to shift the burden of proof from the State to Acuna."

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State v. Acuna Valenzuela,
245 Ariz. 197 (2018)

- **"Misconduct" allegations/vouching**
- **Argument:**
  "We know that the defendant had gunshot residue on him...." & "We know the defendant attempted to shoot and kill Perla"

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State v. Acuna Valenzuela,
245 Ariz. 197 (2018)

- **"Misconduct" allegations/vouching**
- **Held:**
  "Although these comments from the prosecutor come *close to the line*, they do not use 'I' or 'me' to indicate what her personal view of the case was to the jury. Thus, the prosecutor did not impermissibly express her personal opinion to the jury."

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State v. Acuna Valenzuela,
245 Ariz. 197 (2018)

- "Misconduct" allegations/vouching
- Held:
  "[W]e find the use of 'we know' on behalf of the government concerning. This is because there is a fine contextual line between the use of 'we know' inclusively, i.e., to describe evidence and outline inferences from that evidence with the jury, and the use of 'we know' in an exclusive manner, i.e., to refer to the State collectively."

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State v. Acuna Valenzuela,
245 Ariz. 197 (2018)

- "Misconduct" allegations/vouching
- Argument:
  [T]he defendant wants you to stop at the manufactured testimony of Griselda and Sylvia, and we ask that you fight a little harder past that. You have been presented with the truth."

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State v. Acuna Valenzuela,
245 Ariz. 197 (2018)

- "Misconduct" allegations/vouching
- Held:
  "[T]he juxtaposition of 'manufactured' defense witness testimony against 'the truth' implied that the prosecution was indeed the party that had provided the jury with 'the truth.' This was impermissible vouching."
- Isolated, no prejudice

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State v. Acuna Valenzuela,
245 Ariz. 197 (2018)

- **Integrity of defense counsel?**
- **Argument:**
  ***"Neither of the sisters had any problems answering the questions posed by the defendant's lawyer.... Compare that to how they acted on cross-examination,"* &**

  "...the defendant wants you to stop at the manufactured testimony of Griselda and Sylvia, and we ask that you fight a little harder past that."

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State v. Acuna Valenzuela,
245 Ariz. 197 (2018)

- **Held:**

"Although these statements come *very close* to misconduct, when taken in context, they relate to witness credibility. The prosecutor should not have highlighted Acuna's defense counsel in describing the defense witnesses' testimony, and we do not condone prosecutors appearing to accuse the defense of 'manufacturing' testimony. But...taken in context, these statements relate to witness credibility, rather than to defense counsel's integrity, and do not constitute misconduct."

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State v. Acuna Valenzuela,
245 Ariz. 197 (2018)

Argument:

"But sometimes like now crimes are just so outrageous, so extreme...they cry out for the maximum penalty. Justice in this case, justice for Edgar, deserves no less."

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State v. Acuna Valenzuela,
245 Ariz. 197 (2018)

Held:

"The statement asking the jury to do 'justice for Edgar' was arguably inappropriate insofar as it asked the jury to 'strike some sort of balance between the victim's and the defendant's rights.'" citing *State v. Bible,* 175 Ariz. 549, 603, (1993)

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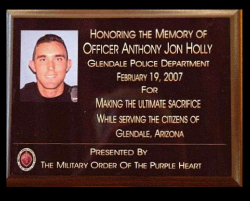
State v. Hulsey,
243 Ariz. 367 (2018)

- **Glendale traffic stop**
- **Pulls weapon & kills officer**
- **Defense: Officer Goitia killed victim**



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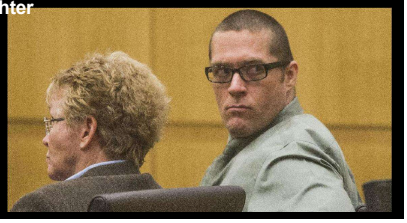
State v. Hulsey,
243 Ariz. 367 (2018)

- **Destruction of evidence**
- **Rule 404(b)/meth use**
- **Provocation manslaughter**
- **"Misconduct" claims**



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State v. Hulsey,
243 Ariz. 367 (2018)

- Destruction of evidence
- Bullet fragments in victim's skull
- Not collected
  - Too small/ME=no forensic value
  - Would have disfigured
- M/Exhume... Cremated... Withdrawn

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State v. Hulsey,
243 Ariz. 367 (2018)

- Trial court gave *Willits* instruction
- Destruction of evidence
- Constitutional duty to preserve
  - Exculpatory value
  - Apparent before destroyed
  - No other reas. avail. means

  OR
  - Potentially useful
  - Bad faith

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State v. Hulsey,
243 Ariz. 367 (2018)

- Destruction of evidence
- No bad faith
- ME and detective didn't know defense
- Merely "potentially exculpatory" at best

33

State v. Hulsey,
243 Ariz. 367 (2018)

- Rule 404(b)/meth use
- D used night before
- During stop, gave pipe/meth to rear passenger
- Admissible to explain reaction to police
- Explain Hulsey's agitation, flight, and use of gun

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State v. Hulsey,
243 Ariz. 367 (2018)

- Provocation manslaughter
- *Not a lesser of 2nd degree murder*
- Still proper when supported by evidence
- No evidence officers provoked Hulsey

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State v. Hulsey,
243 Ariz. 367 (2018)

- Misconduct claims
- Argument:
  Defense witness "is somebody that you really can't trust."
- Close to crossing the line
- Less vocal on cross= fact-based argument

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State v. Hulsey,
243 Ariz. 367 (2018)

- Impugning counsel's integrity
- Don Quixote, tilting at windmills
- Neverland, Land of Oz
- Defense theory vs. defense counsel
- Equating counsel to Don Quixote impugned integrity
- Brief/can't say affected the verdict

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State v. Hulsey,
243 Ariz. 367 (2018)

- Vouching
- *"She told you how many [rounds were fired]. Four rounds. Do you think she sat down and read the police report? No, they don't. She's not privy to that. She didn't make it up. She's somebody who heard it."*
- Outside the record, improper
- *De minimis*

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State v. Hulsey,
243 Ariz. 367 (2018)

- Appeal to passions
- Improper if:

1. call to attention of jurors matters they would not be justified in considering, and
1. high probability jurors were influenced

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State v. Hulsey,
243 Ariz. 367 (2018)

- Appeal to passions
- "First to answer call... call to his death"
- Father: visualizing son's "last agonizing moments"
- Did not improperly appeal to passions

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State v. Hulsey,
243 Ariz. 367 (2018)

- For whom the bell tolls...tolls for each of you to do your duty and return a verdict of death
- Error
- Not of such magnitude to cause prejudice

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State v. Hulsey,
243 Ariz. 367 (2018)

- Expert looked you right in the eye and lied
- Incorrect
- Improper
- Effect subsided after redirect

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State v. Hulsey,
243 Ariz. 367 (2018)

- Supreme Court discusses:
  - Lack of respect
  - Poor courtroom decorum
  - Unnecessary attacks on defense counsel
- "We... remind prosecutors...they are to act as ministers of justice and exercise professionalism even in the heat of trial."

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Acuna Valenzuela & Hulsey

- Are unfounded accusations of misconduct being used beyond the appellate context?
  - *Misconduct is endemic*
  - *vs.*
  - *Baseless misconduct claims are endemic & actual misconduct is rare*
- Are our appellate courts sufficiently clear when rejecting baseless misconduct claims?

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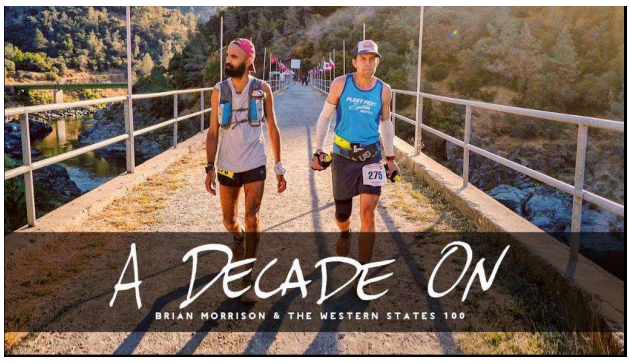

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State v. Malone,
245 Ariz. 103 (2018)

- Victim tries to break with Malone
- Malone chases her down
- Malone kills her and shoots her friend

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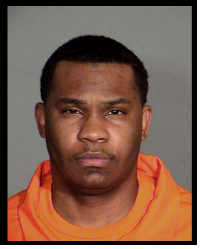
State v. Malone,
245 Ariz. 103 (2018)

- Malone claims character trait/impulsivity
- Mother testifies
  - Poor coping skills
  - Inability to handle stress/tension
- Neuropsych expert testifies
  - Tests reveal impulsivity
  - Court precludes brain damage/brain injury



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State v. Malone,
245 Ariz. 103 (2018)

Impulsivity Memory Lane

- ***Christensen,*** **129 Ariz. 32 (1981): Character trait/impulsivity- rebut premed.**
- ***Mott*****, 187 Ariz. 536 (1997): No diminished capacity short of insanity**
- ***Clark v. Arizona*****, 548 U.S. 735 (2006): U.S. Supremes invent "observation evidence"**

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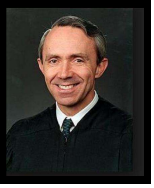
State v. Malone,
245 Ariz. 103 (2018)

"First, there is 'observation evidence' in the everyday sense, testimony from those who observed what Clark did and heard what he said; this category would also include testimony that an expert witness might give about Clark's tendency to think in a certain way and his behavioral characteristics.... Observation evidence in the record covers Clark's behavior at home and with friends, his expressions of belief around the time of the killing that 'aliens' were inhabiting the bodies of local people (including government agents), his driving around the neighborhood before the police arrived, and so on."

Clark v. Arizona**, 548 U.S. 735, 757–58 (2006)**



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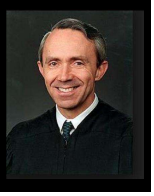
State v. Malone,
245 Ariz. 103 (2018)

3 Types of Behavioral Tendency Evidence

- **Observation**
- **Mental disease**
- **Capacity**

Only observation evidence is admissible outside an insanity defense to negate mens rea



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State v. Malone,
245 Ariz. 103 (2018)

We don't know where "observation evidence" comes from...

"The distinction the [U.S.] Supreme Court drew [in *Clark v. Arizona*] between 'observation evidence' and other mental-health evidence is not immediately apparent in *Mott* (or any other Arizona case authority)."

State v. Buot, 232 Ariz. 432, 435 (App. 2013)

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State v. Malone,
245 Ariz. 103 (2018)

And we don't know what observation evidence means...

"In the years since *Clark* was decided, no Arizona court has addressed these issues or what the Supreme Court in that case meant when it observed that *Christensen* allowed 'observation evidence' of a defendant's character trait. We need not do so here because we conclude that *Christensen* does not apply in this case."

Buot, 232 Ariz. at 435-36

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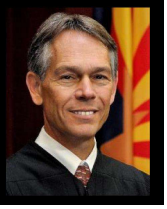
State v. Malone,
245 Ariz. 103 (2018)

AZ Supremes give some guidance in *State v. Leteve*, 237 Ariz. 516 (2015):

- Can come from an expert
- No temporal restrictions
- Could include prescription drug use



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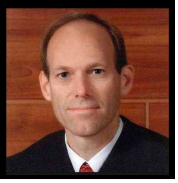
State v. Malone,
245 Ariz. 103 (2018)

It wasn't confusing enough...

"Here, evidence that Malone suffered from a *species* of brain damage that made it more difficult for him to reflect—and therefore more likely to act impulsively—would be both relevant and probative on the question of whether he suffered a character trait of impulsivity.... However, the precluded brain-damage testimony also can be correctly characterized as evidence of a lesser or diminished capacity to act with premeditation...a *species* of evidence our supreme court found inadmissible in *Mott*."



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State v. Malone,
245 Ariz. 103 (2018)

species [spee-sheez, -seez] .0 *

EXAMPLES | WORD ORIGIN SEE MORE SYNONYMS FOR species ON THESAURUS.COM

noun, plural **species.**

1 a class of individuals having some common characteristics or qualities; distinct sort or kind.

2 *Biology* . the major subdivision of a genus or subgenus, regarded as the basic category of biological classification, composed of related individuals that resemble one another, are able to breed among themselves, but are not able to breed with members of another species.

3 *Logic* .
a one of the classes of things included with other classes in a genus.
b the set of things within one of these classes.

4 *Ecclesiastical.*
a the external form or appearance of the bread or the wine in the Eucharist.
b either of the Eucharistic elements.

5 *Obsolete* . specie; coin.

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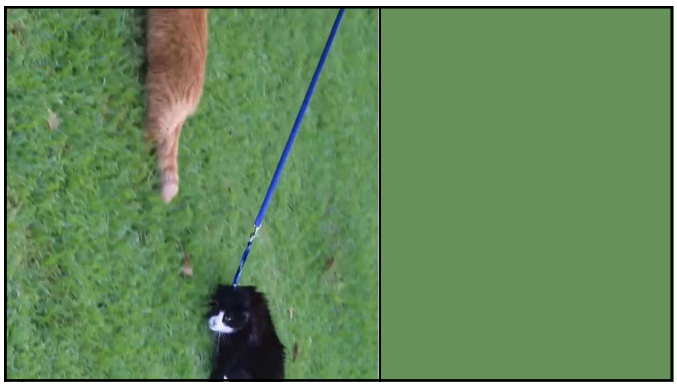

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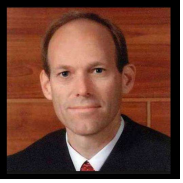
State v. Malone,
245 Ariz. 103 (2018)

- "Here, Malone did not proffer the expert testimony regarding brain damage to prove that he was incapable of reflecting. Rather, the results of those tests were offered to demonstrate a brain condition that rendered it less likely that he may have done so."
- *Quite a fine line...*



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State v. Malone,
245 Ariz. 103 (2018)

- But don't worry....
- "[T]rial courts have effective and familiar tools to ensure evidence is considered exclusively for the proper purpose."

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State v. Malone,
245 Ariz. 103 (2018)

- Lew Brandes/effective trial strategy
- Did not challenge impulsivity trait
- Focused on evidence of reflection
- Harmless error

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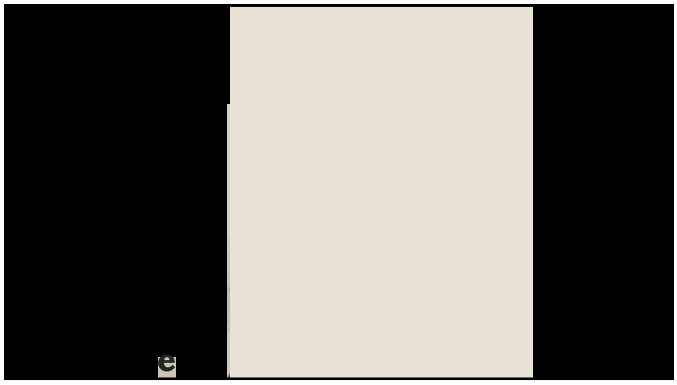

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State v. Malone,
245 Ariz. 103 (2018)

- Justice Brearcliffe's dissent
- Physical evidence of brain defect is not observation evidence
- Observation evidence = behavior
- Remember, 3 kinds of evidence:
  - Mental disease
  - Capacity
  - Observation

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State v. Malone,
245 Ariz. 103 (2018)

- Brearcliffe: Future juries compelled to release dangerous criminals
- Eckerstrom: Dissent overlooks "our reasoning here will inform only whether a concededly dangerous person will be convicted of first- or second-degree murder."

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State v. Richter,
245 Ariz. 1 (2018)

- 3 sisters kept locked in 2 bedrooms
- Filthy living conditions
- Fed scraps from five-gallon bucket
- Physically abused
- Charges span 86 days

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State v. Richter,
245 Ariz. 1 (2018)

- Mom claims Dad made her do it (duress)
- Offers testimony of pyschologist
- State argues:
  - no immediacy &
  - this is diminished capacity
- Trial court precludes duress & expert

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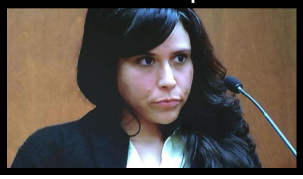
State v. Richter,
245 Ariz. 1 (2018)

- COA holds duress admissible
- Expert testimony = observation evidence
- Supremes vacate COA opinion
- Except the “reverse and remand” part



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State v. Richter,
245 Ariz. 1 (2018)

- *Mott* precluded battered woman syndrome to negate intent
- Here, Mom sought to justify, not negate

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State v. Richter,
245 Ariz. 1 (2018)

- Be aware of 13-205
  - Trial court erroneously required D to prove duress by preponderance
- Evidence of justification= disprove BRD

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State v. Richter,
245 Ariz. 1 (2018)

- Immediacy: Present, imminent, and impending

HELD:
- Threat can precede by several days
- Coercing party may be physically removed
- Threat may be renewed over years

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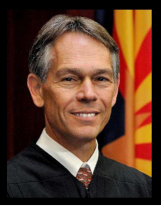
State v. Richter,
245 Ariz. 1 (2018)

- State argues duress not in 13-415
  - 13-415 admits past acts of DV by victim
- BUT... 13-415 applies if *DV'er* is victim
- Whereas, duress applies if *3P* is victim



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State v. Richter,
245 Ariz. 1 (2018)

- Takeaway?
- Be very careful precluding defenses

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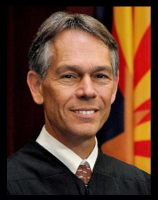
State v. Richter,
245 Ariz. 1 (2018)

- Some help on observation evidence:
- Expert report ≠ observation evidence
  - Detailed pattern of abuse
- Can't present hearsay as observation ev.
- Duress is objective
  - Observation evidence "likely not admissible"



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State v. Pina-Barajas,
244 Ariz. 106 (App. 2018)

- P-B is a PP
- Officer finds 3 guns in his truck
- Admits they are his and he is PP

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State v. Pina-Barajas,
244 Ariz. 106 (App. 2018)

- Admissions introduced at trial
- P-B seeks to admit other statements
- Man threatened/shot at him 2 weeks ago
- Trial court precludes
  - Necessity defense precluded (not immediate)
  - Rule 106 didn't apply

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State v. Pina-Barajas,
244 Ariz. 106 (App. 2018)

- Immediate threat is one that requires urgent unlawful action
- *In Re Roy L.* – necessity precluded because threat not the same day
- No reasonable alternative?
- Other options given time lapse

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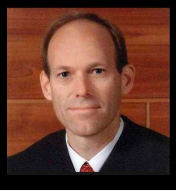
State v. Pina-Barajas,
244 Ariz. 106 (App. 2018)

- What about *Richter*?
- No ongoing threat here
- No continuing proximity to the threat



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State v. Pina-Barajas,
244 Ariz. 106 (App. 2018)

- Rule 106/completeness
- Cannot use 106 to inject irrelevant issues
- Reasons for guns were irrelevant

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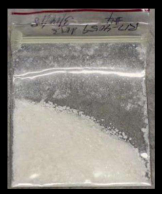
State v. Escalante,
245 Ariz. 135 (2018)

- Tracker on Escalante's truck
- Detectives follow, Escalante evades
- Stop yields gun, scale (with meth residue), dryer sheets, coffee beans, "throw phone"
- Hours later, deputy finds baggie with 48 grams of meth in street



78

State v. Escalante,
245 Ariz. 135 (2018)

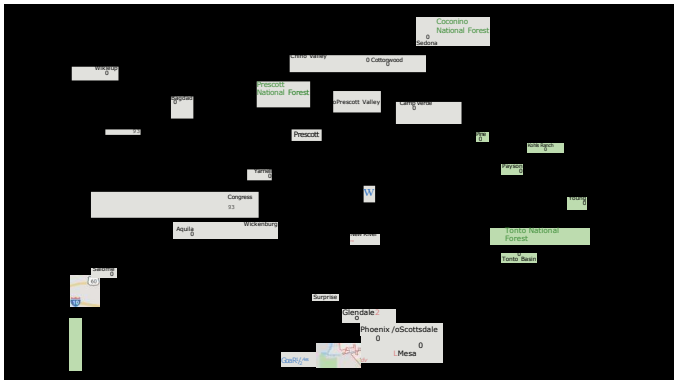
- Meaning of fundamental error review
  - Goes to foundation of case
  - Takes fundamental right
  - Prevents fair trial
- Disjunctive!

79

State v. Escalante,
245 Ariz. 135 (2018)

Drug courier profile evidence:
- Heat runs
- Surveillance cameras
- Travel to known drug activity areas
- Dryer sheets & coffee beans
- Secret compartments
- Nighttime travel
- Firearms
- Throw phones
- Scales
- Travel along "drug pipelines" like I-17

80



81

State v. Escalante,
245 Ariz. 135 (2018)

- Closing argument: **"People who deal drugs have certain ways of behaving."**
- Is this profile evidence?
- Profile evidence = D has characteristics typical of person engaged in particular kind of activity. (***State v. Ketchner***)

82

State v. Escalante,
245 Ariz. 135 (2018)

- Profile evidence inadmissible to prove guilt
- Expert testimony about behaviors **not OK** to prove consistent w/ drug trafficking

83

State v. Escalante,
245 Ariz. 135 (2018)

- Expert testimony about behaviors **OK** to help jury understand evidence
- General behavior patterns of child sexual abuse victims (***State v. Salazar-Mercado***)

84

State v. Escalante,
245 Ariz. 135 (2018)

- COA did not find prejudice
- Vacated/reversed as to trafficking count
  - Jury asked many questions about the baggie
- Reasonable juror could reach different result

85

State v. Todd,
244 Ariz. 374 (2018)

- Wendy Todd gets in dispute w/ F.O.
- About a "dolly and pickaxe" (Cochise County)
- Goes to F.O.'s place & punches his microwave
- Leaves on her motorcycle
- Bullet penetrates wall 1 minute later

86

State v. Todd,
244 Ariz. 374 (2018)

- Todd then goes to M.O.'s house
- Arrested
- Hits & spits @ officers
- Later, released and admits to M.O.
- Trial/conviction/DBS & Agg. Assault

87

State v. Todd,
244 Ariz. 374 (2018)

- Should court have allowed impeachment with M.O.'s 15 year-old conviction?
  - Trafficking meth
- 3 part test (Rule 609(b)):
  - Probative value substantially outweighs prejudicial effect
  - Admission supported by specific facts/circs.
  - Proponent gives reasonable written notice

88

State v. Todd,
244 Ariz. 374 (2018)

- Properly precluded
- Low probative value
- No record of specific facts/circumstances
- No written notice

89

State v. Todd,
244 Ariz. 374 (2018)

- Should court have sanitized F.O.'s convictions (receiving stolen property)?
- Receiving stolen property doesn't involve "dishonesty or false statement"
- Not error to sanitize

90

State v. Todd,
244 Ariz. 374 (2018)

- Should court have permitted impeachment with pending (F.O.) and potential (M.O.) charges?
- F.O. facing unrelated charges
- Emails discussed added charges and whether F.O. would plead the Fifth

91

State v. Todd,
244 Ariz. 374 (2018)

- Jury should have heard - hope of leniency
- Error harmless
- Statements mirrored those F.O. made before the unrelated charges
- Testimony corroborated

92

State v. Todd,
244 Ariz. 374 (2018)

- M.O. (testified about Todd's admissions)
- M.O. worried about being charged as PP
- Should have been allowed to cross
- Error harmless

93

State v. Todd,
244 Ariz. 374 (2018)

- ***Willits*: "lost interview recordings" and no DNA or prints on gun**
- **Deputy did not record, took notes and wrote report**
- **"Assuming *arguendo* that failure to record an interview equates with destruction of evidence, Todd has not demonstrated any lost evidence."**
- **This is a problematic assumption...**
- **No tendency to exonerate**

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State v. Todd,
244 Ariz. 374 (2018)

- ***Willits*: lost interview recordings and no DNA or prints on gun**
- **"State's decision not to develop DNA or fingerprint evidence from the gun ... does not constitute a loss or destruction of evidence."**
- **This is how recording should be treated, absent additional showing**
- **Todd could test the gun but did not**

95

Dominguez v. Foster,
243 Ariz. 499 (2018)

- **The premeditation instruction in your statute books is wrong!**
- **We must give Grand Jury the correct instruction (in writing)**

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